H. C. OF A. 1908.

BAYNE v. BAILLIEU.

BAYNE v. RIGGALL.

XIV. (A) to summarily put an end to the action as against the defendant Riggall, and thus deprive the plaintiff of her right to have her case tried.

BAYNE v. BAILLIEU.

Appeal dismissed with costs.

BAYNE v. RIGGALL.

Appeal allowed. Summons dismissed with costs. Respondent to pay costs of appeal.

Solicitor, for the appellant, *J. L. Clarke.*

Solicitors, for the respondents, *Rigby & Fielding*; *Blake & Riggall.*

B. L.

[HIGH COURT OF AUSTRALIA.]

DOODEWARD . . . . . APPELLANT;
PLAINTIFF,

AND

SPENCE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *May* 21, 22; *July* 31.

Griffith C.J., Barton and Higgins JJ.

Action of detinue—Right to possession of corpse—Monstrous birth—Preservation as curiosity.

A dead human body may under some circumstances become the subject of property.

A corpse may possess such peculiar attributes as to justify its preservation on scientific or other grounds, and, if a person has by the lawful exercise of

work or skill so dealt with such a body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, and, if deprived of its possession, may maintain an action for its recovery as against any person not entitled to have it delivered to him for the purpose of burial, subject to any positive law forbidding its retention under the particular circumstances.

Though the public exhibition of such a body may be a misdemeanour as being indecent and injurious to the public welfare, the mere retention of it unburied is not necessarily unlawful.

So *held, per Griffith* C.J. and *Barton* J. ; *Higgins* J. dissenting.

Per Higgins J.—There can be no property, either general or special, in a human corpse, and, therefore, under no circumstances can any person maintain an action of detinue or trover in respect of it. The only right analogous to a right of property for which there is any precedent is a right on the part of persons who by virtue of their relationship with the deceased are regarded as under a duty to give the corpse decent burial, and who seek to obtain it for that purpose.

Decision of the Supreme Court, (*Doodeward* v. *Spence*, (1907) 7 S.R. (N.S.W.), 727), reversed.

APPEAL from a decision of the Supreme Court dismissing an appeal from a judgment of nonsuit in a District Court in an action for detinue.

The subject matter of the action was the corpse of a still-born two-headed child, which the appellant had had in his possession for some years, and which had been taken from him by the respondent, an Inspector of Police, on the occasion of a prosecution of the appellant for exhibiting the body in public. The facts sufficiently appear in the judgments hereunder.

W. J. Curtis, for the appellant. The appellant proved that the object was in his possession and that it had been taken away by the respondent. As between the parties nothing further need be proved. No question of public decency was raised. The whole case turned on the right of possession. The possession of the plaintiff must be presumed to be lawful until the contrary is shown. The Court below were of opinion that, because there could be no larceny of a corpse at common law, there could never under any circumstances be any rights of property in a corpse. Practically all the cases on the subject deal with larceny at

H. C. OF A. 1908.

DOODEWARD v. SPENCE.

common law. [He referred to *R.* v. *Haynes* (1); *Kenny, Outlines of Criminal Law*, p. 192; *R.* v. *Fox* (2); *Williams* v. *Williams* (3).] But whatever may be the law as to property in a corpse for the purposes of larceny, it does not apply to a body for all time. Human skill or treatment bestowed upon the body may give it a totally different character, so that it ceases to be a corpse within the meaning of the rule. The consequences of holding that there can be no rights of property in a body or a part of a body so treated would be to render many of the most valuable collections in hospitals and museums liable to be carried away with impunity. [He referred to *Stephen's, Digest of the Criminal Law*, Art. 318.] Moreover, this was not a corpse. It was a mere *fœtus*, never having been born. Never having lived in the legal sense, it cannot be treated as the dead body of a human being.

Piddington, for the respondent. There can be no property in a corpse by the common law. This rule applies, not only to the human body as the subject of the criminal law, but also in respect of civil rights. The protection of the human body by law is based on respect for the feelings of the living, and everything that savours of trafficking in dead bodies is unlawful. The exhibition of a monstrous birth is a misdemeanour: *Herring* v. *Walround* (4). It is a misdemeanour to sell a dead body, and therefore no legal right to a corpse can be acquired by purchase. There is a duty on the person who has control of the body to bury it at once decently if he has the means.

[BARTON J.—You may cremate a dead body provided that you do not thereby occasion a nuisance: *R.* v. *Price* (5).]

That was followed in *R.* v. *Stephenson* (6); but it is a misdemeanour to burn a corpse so as to prevent an inquest being held if it is a case in which an inquest should be held. As far as property is concerned, a corpse is somewhat analogous to animals *ferœ naturæ*, except that a human being cannot be the subject of property whether alive or dead. Even the heir has no property in the bodies of his ancestors and can bring no action in

(1) 2 East. P.C., 652; 12 Rep., 113.
(2) 2 Q.B., 246.
(3) 20 Ch. D., 659.
(4) 2 Ch. Ca., 110.
(5) 12 Q.B.D., 247.
(6) 13 Q.B.D., 331.

respect of them: 2 *Blac. Comm.*, c. 28. Executors, though they have no property in the body, may obtain a mandamus to compel another to hand it over for burial. No other right exists with respect to the dead except the right of burial. That may be enforced by those upon whom there is a duty to see to the burial, and the hindrance of it is a misdemeanour, but there is no right which will support an action of detinue or trover, even in the case of a freak of nature: *Handysides Case* (1); *R.* v. *Haynes* (2); *R.* v. *Fox* (3); *R.* v. *Coleridge* (4); *Williams* v. *Williams* (5). The case of a mummy is not analogous. That may be considered to have been really changed in nature by some special process, so as to be no longer a mere human body, and the length of time that has elapsed since death is so great as to remove it from the category of things held sacred by the living. But in this case the body remains the body of a child, who may still have relatives living to whom its retention unburied might cause pain. Lapse of time does not make any difference to the legal aspect of the question. The law requires that the body should be buried, and, once buried, should so remain: *R.* v. *Vann* (6); *Foster* v. *Dodd* (7); *In re Dixon* (8); *R.* v. *Stewart* (9); *R.* v. *Jacobson* (10); *R.* v. *Sharpe* (11); *R.* v. *Lynn* (12); *R.* v. *Cundick* (13); *Stephen's Digest of Criminal Law*, 3rd ed., Art. 125. The ground of the rule admits no distinction between the case of a still-born and a fully born child. It may be that, if special skill had been applied so as to change the nature of the thing and render it an informative curiosity, the rule would not apply. But this body has merely been placed in spirits. The appellant cannot rely upon the possession of Dr. Donahoe as being good against the world except the rightful owner, because that possession was founded upon a misdemeanour, and could not found a cause of action: *R.* v. *Gillies* (14).

The defendant came into possession rightfully, and therefore

(1) 2 East. P.C., 652; Hawk. P.C., 148.
(2) 12 Rep., 113.
(3) 2 Q.B., 246.
(4) 2 B. & A., 806.
(5) 20 Ch. D., 659.
(6) 2 Den., 325.
(7) L.R. 3 Q.B., 67.
(8) (1892) P., 386, at p. 393.
(9) 12 A. & E., 773.
(10) 14 Cox Cr. Ca., 522.
(11) Dears. & B., 160.
(12) 2 T.R., 733.
(13) 1 Dow. & Ry., N.P., 13.
(14) Russ. & R., 366 (*n*).

H. C. OF A. 1908.

DOODEWARD v. SPENCE.

the plaintiff who claims through a wrong-doer can have no title as against him: *Buckley* v. *Gross* (1). Possession cannot be evidence of ownership of something which is not a subject of property. [He referred to *Coke Inst. III.*, p. 202; *Pollock and Wright on Possession in the Common Law*, c. 4.] The rights of persons in respect of dead bodies are now governed by the *Anatomy Act*, No. 9 of 1901, which was founded on 2 & 3 Wm. IV. c. 75. That Act contains the only exceptions to the general rule of immediate burial. But even there the burial is only postponed for the purposes of scientific examination in specified places. No rights of property are created. The "possession" there referred to is only *quasi*-possession, for the purposes mentioned in the Act.

Curtis, in reply. Although at death a corpse may be *res nullius*, that is no reason why under certain circumstances it should not become the subject of property, just as animals *ferœ naturæ* become the property of the person who has killed or domesticated them. But there may be a right of possession even where there is no property. The law recognizes the possession of a corpse by the executor. Possession is not dependent upon property. The notion of possession was antecedent to that of property. If the defendant is right there can be no right of possession to any part of a corpse, however valuable, and however it may have changed in character.

The following judgments were read:—

May 22.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court dismissing an appeal from a judgment of non-suit in a District Court in an action for detinue brought by the appellant. The subject matter of the action was the preserved body of what has been spoken of in the case as "a two-headed baby." It appears from the evidence that the mother of the baby gave birth to it in New Zealand forty years ago, that it was still-born (by which I understand that it never had an independent existence), that the mother's medical attendant, a Dr. Donahoe, who arrived after the birth, took the body away

(1) 3 B. & S., 566; 32 L.J.Q.B., 129.

with him, preserved it with spirits in a bottle, and kept it in his surgery as a curiosity, that at his death in 1870 it was sold by auction with his other personal effects and realized between £30 and £40, and that it afterwards came into the possession of the appellant. It must be assumed that Dr. Donahoe's possession of the body was lawful, so far as the possession of such an object can be lawful.

The Supreme Court were of opinion that there can be no right of property in the dead body of a human being, and consequently that such a body cannot be the subject of an action for detinue or trover. *Pring* J. further expressed the opinion that there can be no right of property in a portion of a human body which has been been severed from it.

The authorities referred to in support of the decision of the Supreme Court, with one exception, relate (as was pointed out by *Cohen* J.) to human bodies awaiting burial, and they appear to assert a general rule that when a human being dies property in his body does not vest in anyone, although certain persons have duties, and perhaps rights, with respect to it. Thus, a mandamus will lie to compel delivery of a corpse to the person charged with the duty of burying it: *R.* v. *Fox* (1). But it cannot at that moment, while awaiting burial, be the subject of larceny, since the ownership could not be laid in any one. The circumstance, however, that a thing was not the subject of larceny at common law did not determine the question whether an action of detinue could be brought in respect of it. For instance, deeds relating to land were not at common law the subject of larceny, but detinue would lie in respect of them (see *Fitz-Herbert de Naturâ Brevium*, p. 138 a). An unburied corpse awaiting burial is *nullius in rebus*. All that is said by the authorities to which we were referred, except *Dr. Handyside's Case* (2), appears to have been said from this point of view. It does not appear who was the plaintiff in that case, which might apparently have been decided on the ground that the plaintiff had not established any right of possession in himself. But it does not follow from the fact that an object is at one time *nullius in rebus* that it is incapable of becoming the subject of ownership. For instance, the

(1) 2 Q.B., 246.

(2) 2 East P.C., 652.

H. C. OF A. 1908.

DOODEWARD v. SPENCE.

Griffith C.J.

dead body of an animal *ferœ naturæ* is not at death the property of any one, but it may be appropriated by the finder. So, it does not follow from the mere fact that a human body at death is not the subject of ownership that it is for ever incapable of having an owner. If that is the law, it must have some other foundation. After burial a corpse forms part of the land in which it is buried, and the right of possession goes with the land. Even, however, if the asserted rule was intended to be of general application—which I doubt—it does not follow that there can be no exception to it. Many doctrines have been asserted on the supposed authority of learned persons, who, addressing themselves to one aspect of a question, have used language which has been generalized in a manner at which no one would have been more surprised than the supposed authors of the doctrines. I do not, myself, accept the dogma of the verbal inerrancy of ancient text writers. Indeed, equally respectable authority, and of equal antiquity, may be cited for establishing as a matter of law the reality of witchcraft. But in my opinion none of the authorities cited afford any assistance in the present case. We are, therefore, free to regard it as a case of first instance arising in the 20th century, and to decide it in accordance with general principles of law, which are usually in accord with reason and common sense.

The foundation of the argument for the respondent must be that the continued possession of an unburied human body after death by any one except for the purpose of burial is necessarily unlawful. If it is, it follows that no action can be founded upon a disturbance of that possession.

But, if it is not necessarily unlawful, then in my opinion it equally follows that, in any case in which the possession is lawful, the law will by appropriate remedies redress any such disturbance. The very term "lawful possession" connotes a right to invoke the law for its protection. A lawful possession which does not involve any right cognizable by law is a contradiction in terms. Otherwise there would be a field of English law where still prevails

> "The good old rule, the simple plan,
> That he should take who has the power
> And he should keep who can."

The question to be determined, then, is whether the continued possession of a human corpse unburied is *in re ipsâ* unlawful. If it is, the reason must be that such possession is injurious to the public welfare, and the notion that it is so injurious must be founded upon considerations of religion or public health or public decency. The question whether a particular act is injurious to the public on any such grounds is a mixed question of law and fact, so that what may be injurious at one time or under one set of circumstances may not be so at another time and under different circumstances. For instance, a discussion which would, not so very long ago, have been held to be rank blasphemy might not now be considered to be even irreverent. What would have been regarded a century ago as gross negligence in the treatment of a disease might now be thought the adoption of necessary and obvious precautions, and *vice versâ*. I am not sure that notions of public decency are not equally liable to change.

On what ground, then, can it be asserted that the continued possession of a corpse unburied is in all cases and in all events injurious to the public welfare? So far as any argument is based upon the ecclesiastical law as part of the common law it is sufficient to say that that part (if it be a part) of the common law was never in force in Australia. The question whether the possession of a corpse is injurious to the public health is manifestly not an abstract question of law, but a concrete question of fact, depending upon the circumstances of the particular case. As to public decency, some dealings with a corpse no doubt constitute a misdemeanour, but I know of no authority for saying that the retention of a human body unburied is *ipso facto* a misdemeanour.

It is idle to contend in these days that the possession of a mummy, or of a prepared skeleton, or of a skull, or other parts of a human body, is necessarily unlawful; if it is, the many valuable collections of anatomical and pathological specimens or preparations formed and maintained by scientific bodies, were formed and are maintained in violation of the law.

In my opinion there is no law forbidding the mere possession of a human body, whether born alive or dead, for purposes other

H. C. OF A. 1908.

DOODEWARD v. SPENCE.

Griffith C.J.

than immediate burial. *A fortiori* such possession is not unlawful if the body possesses attributes of such a nature that its preservation may afford valuable or interesting information or instruction. If the requirements of public health or public decency are infringed, quite different considerations arise.

To apply these principles to the present case. Neither public health nor public decency is endangered by the mere preservation of a perhaps unique specimen of malformation. Public decency may, perhaps, be offended by the public exhibition of such an object. But the fact that an object may not be publicly exhibited affords no criterion for determining the lawfulness of the possession of that object. In my opinion it is not *contra bonos mores* to retain such a specimen unburied. If one medical or scientific student may lawfully possess it, he may transfer the possession to another. Nor can the right of possession be limited to students. The manner of use may be controlled, but the possession is not of itself unlawful.

If, then, there can, under some circumstances, be a continued rightful possession of a human body unburied, I think, as I have already said, that the law will protect that rightful possession by appropriate remedies. I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.

In the present case the evidence showed that the body came, not unlawfully, into Dr. Donahoe's possession, that some—perhaps

not much—work and skill had been bestowed by him upon it, and that it had acquired an actual pecuniary value. Under these circumstances, and in the absence of any positive law to the contrary, I think that an action will lie for an interference with the right of possession. I do not think that the *Anatomy Act* has any bearing on the case. I express no opinion on the question whether a still-born child falls within the authorities relating to human corpses.

BARTON J. The facts of this case are novel, and raise a somewhat difficult question. The respondent contends that the subject of the action is a corpse and ought to be buried; and says that he has it in keeping but desires to have it buried. If a person, who had never seen the thing in question and who was otherwise uninformed about it, were told merely that this was an action in which a person wholly unrelated to the deceased in life claimed the right to possess the dead body as against the police, he would be justly astonished, and a lawyer on that information would rightly wonder how such an action could be entertained for a moment. He would say that the only thing to do with a corpse is to give it Christian, which, in the view of *Sir Fitzjames Stephen*, means only decent burial: *Digest of Criminal Law*, Art. 175, note (3). He would point out that the law of England is that everyone commits a misdemeanour who prevents the burial of any dead body, or who, without authority, *dissects* a dead body even from laudable motives, or who having the means neglects to bury a dead body which he is legally bound to bury. He would observe that a person is equally an offender if he disposes of any dead body on which an inquest ought to be taken, without giving notice to a Coroner, or if, being under a legal duty to do so, he fails to give notice to a Coroner, before the putrefaction of a body on which an inquest ought to be held, that such body is lying unburied. He would point to the same article in *Stephen's Digest*, in support of his statement, and to the cases of *R.* v. *Vann* (1); *R.* v. *Lynn* (2); *R.* v. *Scott* (3), and other decisions.

But how far would the critic consider his surprise justified or

(1) 2 Den., 325. (2) 2 T R., 733. (3) 2 Q.B., 248 (*n*).

H. C. OF A. 1908.

DOODEWARD v. SPENCE.

Barton J.

his law applicable, upon further knowledge; upon learning what kind of "corpse" or "dead body" it is that his informant has been describing, and how far the object when seen conforms to the mental picture he had formed of a corpse awaiting burial? It has never existed independently of the physical attachment to the mother. It was never alive in the ordinary sense of human life. It has never drawn the breath of life so as to have expired, for it was still-born. It has been preserved in a jar or bottle with spirits since the day of its birth, now forty years ago. Add to these facts that it is an aberration of nature, having two heads. Can such a thing be, without shock to the mind, associated with the notion of the process that we know as Christian burial? Does it not almost seem indecent to associate that notion with such facts? Do not all these considerations lead us to doubt whether such a thing as a dead-born fœtal monster, preserved in spirits as a curiosity during four decades, can now be regarded as a corpse awaiting burial, the thing which Judges have discussed in decisions and lawyers in textbooks? It would have been difficult to admit that this dead fœtus answered that description at the time, almost immediately after its birth, when Dr. Donahoe was allowed to take it away and when he preserved it in spirits. The difficulty has increased since. If it were ever a corpse awaiting burial, was that a correct description of it when the plaintiff's possession of it was interfered with? It had then been in a state of preservation for thirty-nine years. It had acquired, as the evidence shows, a considerable monetary value, not as a corpse, but as something so unlike an ordinary corpse as to be a curiosity—a well-preserved specimen of nature's freaks. To take the simplest test, is it possible to affirm that the meaning conveyed by the term "unburied corpse" to one who had never seen such an object as this, would include it? There can only be one answer to the question.

On the facts, which are not disputed, I think we are really not discussing the thing which has been the subject of decision in the cases cited. Their authority I do not doubt, but they do not, I think, apply so as to deprive the appellant of redress.

That conclusion clears the case of the difficulties which authority would otherwise place in the way of a determination

on ordinary grounds of legal principle, applying sense and reason to the exceptional facts of this case.

Now, I have given the matter close and repeated consideration in that aspect, and I must say that the impression I formed during the argument has been confirmed. I have read the judgment of the Chief Justice, and I entirely agree with the reasons it embodies, which I hold it unnecessary to amplify. I would add that I do not wish it to be supposed that I cast the slightest doubt upon the general rule that an unburied corpse is not the subject of property, or upon the legal authorities which require the proper and decent disposal of the dead. Further, the gross indecency of publicly exhibiting this object must not be thought to be endorsed as lawful by anything I have said.

I am of opinion that the appeal should be allowed and the nonsuit set aside.

HIGGINS J. This action is for conversion and detinue of the corpse of a still-born two-headed child. The birth took place in 1868, in New Zealand. The medical man in attendance took the body away, and kept it in a bottle till his death in 1870. His effects were sold by auction; and at the auction the father of the plaintiff bought the bottle and the contents for about £36. The plaintiff exhibited the bottle and contents for gain; was prosecuted and arrested; and the defendant, a Sub-Inspector of Police, seized them under warrant. The plaintiff has demanded the return of what was seized; but the defendant, although he has returned to the plaintiff the bottle and the spirits, still retains the corpse at the University museum. No skill or labour has been exercised on it; and there has been no change in its character.

Under these circumstances, I cannot see any reason for doubting that, if this corpse can be the property of any one, it is the property of the plaintiff as against the defendant. It is enough that the plaintiff was in possession of the corpse, and that the defendant took it having no better title to it than the plaintiff. But, in my opinion, there can be no right to recover in trover or in detinue in respect of a thing which is incapable of being property. The action of trover

H. C. OF A. 1908.

DOODEWARD v. SPENCE.

Higgins J.

and the action of detinue are actions for wrongfully converting or wrongfully detaining the plaintiff's property. The foundation of the action is property. In pleadings, the goods converted or detained are stated to be the plaintiff's goods. It is true that a mere possessor is treated by the law as having the property in goods as against one who takes them from him wrongfully; and at first I thought that, even if there could be no property in this corpse, there could be a right of possession as against the defendant, who took it from the plaintiff. The law treats the right of the mere possessor as against one who takes the thing from him as "special property." But if there can be no property, there can be no "special property;" and there is no instance that I know of an action of trover or detinue lying for a thing which cannot be the subject of property. But in *Fines* v. *Spencer* (1) it was held that the possessor of a hawk—a bird not the subject of property until reclaimed or tame—could not succeed in trover against one who took possession of it as it was not "reclaimed or tame"; and see Lord *Raymond*, 251; *Grimes* v. *Stacke* (2). The same rule applies to deer: *Fines* v. *Spencer* (1). Property involves a right of exclusive and permanent possession. Trover lay for negroes, at the time when the British law recognized property in negroes: *Chambers* v. *Warkhouse* (3). They were then merchandize—property. But no one ever heard of an action of trover or detinue for a human being whether alive or dead unless in the case of a slave. No one has heard, I think, of a guardian, entitled to the custody of his ward, bringing an action of trover for the ward. He has to proceed for a *habeas corpus*, or in equity. Perhaps the true basis of "special property," the right of a mere possessor to recover from a wrongdoer, is that possession furnishes an irrebuttable presumption as against the wrongdoer that the possessor is the owner; and that is the reason why a plaintiff, if a mere possessor, recovers the full value of the chattel from the defendant. The wrongdoer is estopped from disputing the plaintiff's title—if there can be a title. But he is not estopped from showing that there could never have been any title.

The question then is, can there be property in a dead human

(1) 3 Dy., 306*b*. (2) Cro. Jac., 262. (3) 3 Lev., 336, at p. 337.

body? First, such a body cannot be stolen—it cannot be the subject of larceny (*Stephen's Digest Criminal Law*, 5th ed., p. 252). True, it does not necessarily follow that, because larceny will not lie, there can be no property in the thing. Yet in whom can the property in the body be laid after death? It does not belong to the parents. It does not vest in the executor or administrator, who takes the goods and chattels of the deceased, not the body of the deceased. No one can have, under British law, property in another human being—alive or dead. Even a condemned criminal has property in his own body till his execution: 3 *Coke Inst.*, 215. The question is not now raised for the first time; and the authorities are as explicit as they can be:—

"There can be no property in a dead corpse" (1).

"The dead body is not capable of any property" (although the sheets in which it is wrapped belong to the person who buried): *Coke* 3 *Inst.*, 110, 203; *Haynes' Case* (2).

"There can be no property in the human body, either living or dead": 1 *Hawkins P.C.*, 148 (*n.* 8).

"Our law recognizes no property in a corpse": *R.* v. *Sharpe* (3).

"Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes": 2 *Bl. Com.*, 429.

"Stealing the corpse itself, which has no owner, (though a matter of great indecency) is no felony": 4 *Bl. Com.*, 236.

But in addition to all the positive statements of Judges such as *Coke* J., and of textwriters whose works are as weighty as most judgments, there appears to have been an express decision to the effect that trover will not lie for a corpse. According to 2 *East's Pleas of the Crown*, p. 652, one Dr. Handyside took away the bodies of a *lusus naturæ*—two children who grew together; trover was brought against him; and *Willes* C.J., held that the action would not lie "*as no person had any property in corpses.*" The ground of the decision was, not that the particular plaintiff had not shown any right of property or of possession, but that no person had any property in corpses. This case is also to be found stated in the same way in *Hawkin's Pleas of the Crown*,

(1) 2 East P.C., 652.
(2) 12 Rep., 113.
(3) Dears. & B., 160, at p. 163.

H. C. OF A. 1908.

DOODEWARD v. SPENCE.

Higgins J.

148 (*n.* 8), and it shows that the same law applies to what Lord *Coke* called "monsters" as well as to normal human beings. It seems that when the "monster" is double-headed, it is the Christian habit to baptize both heads: *Taylor, Medical Jurisprudence*, 4th ed., 277. It is illegal to destroy monsters; any one who kills a two-headed child born alive is guilty of child murder (*ib.* 209, 389). But for *Handyside's Case* (1), there might have been some doubt whether the doctrine of no property in corpses applied to such a being as this; but that was a case of *lusus naturæ*, and in both *East* and *Hale* that case is treated as an actual authority for the doctrine itself. In this case it is not pretended that the child was born before its due time. It had lived in the womb, and died there before birth. From the nature of the case it was more dependent on its mother than a child who has been born; but it had a distinct life. *Taylor on Medical Jurisprudence* refers to the vulgar opinion that the fœtus only receives life when the woman quickens; "but as ovum, embryo, or fœtus, the contents of the uterus are as much endowed with special and independent vitality in the earlier as in the later periods of gestation" (*ib.* 161). Except as to the double head, the body, so far as appears, was fully formed; and the being was fully as human as the Siamese twins. The doctrine of no property in corpses applies, not only to bodies awaiting burial, but to bodies after burial: *Haynes' Case* (2). *Burn's Ecclesiastical Law*, I., 195, (ed. 1763); but in this case it is clear that the body has never yet been buried, and it still awaits burial if it can get it.

It appears, indeed, that the Supreme Court of Indiana has twice used expressions in favour of property in a corpse. In the only case to which I have access the action was for breach of contract, not for trover or detinue. A husband and wife employed undertakers to take care of and deposit the body of a daughter in a vault until they were prepared to inter; and the action was for breach of this contract: *Renihan* v. *Wright* (3). The *dicta* in these cases in favour of a property in a corpse have been questioned by the Supreme Court of South Carolina in *Griffith* v.

(1) 2 East. P.C., 652.
(2) 12 Rep., 113.
(3) 21 Am. S.R., 249.

Charlotte, Columbia and Augusta Railroad Co. (1). The Judges of South Carolina laid it down in accordance with the English authorities, that there was no property either absolute or special in a corpse; although they regarded the absence of a power of control, with a view to decent interment, as a reproach to the judicial system (see also notes to *Wynkoop* v. *Wynkoop* (2). In *Peirce* v. *Swan Point Cemetery* (3) the Rhode Island Court, while *admitting that there was no property in a dead body* in the ordinary sense, interfered by injunction to prevent the removal of a man's corpse to another part of the cemetery against the will of his daughter and her husband. The Massachusetts Court (*Meagher* v. *Driscoll* (4)) has said:—"*A dead body is not the subject of property*, and after burial it becomes a part of the ground to which it has been committed,—'earth to earth, ashes to ashes, dust to dust'." The same Court —which is a Court of the greatest weight among the State Courts —has also said:—"Neither the husband nor the next of kin have, strictly speaking, any right of property in a dead body," but, inasmuch as there are no ecclesiastical Courts in the States, as in England, the Court asserted a right to interfere between a husband and next of kin in a controversy as to the place of burial of a woman: *Weld* v. *Walker* (5). In *Larson* v. *Chase* (6) the Supreme Court of Minnesota held that a widow was entitled to damages for the dissection of her dead husband. The widow, it was said, had a right to the possession of the body for the purpose of decent burial; but it was admitted as quite possible that the body is not property in the common commercial sense of the term, even though the American Colonies had repudiated the ecclesiastical law and the ecclesiastical Courts. So that, even in the United States Courts, the great preponderance of authority is in favour of the old English principle—whatever we may think as to the peculiar jurisdiction—*for purposes of burial only*, which some of the Courts have asserted. From first to last, I can find no instance of any Court asserting any property in a corpse except in favour of persons who wanted it for purposes

(1) 55 Am. Rep., 1.
(2) 82 Am. Dec., 506, at p. 513.
(3) 14 Am. Rep., 667, at p. 677.
(4) 96 Am. Dec., 759, at p. 761.
(5) 39 Am. Rep., 465.
(6) 28 Am. S. R., 370.

H. C. OF A. 1908.

DOODEWARD v. SPENCE.

Higgins J.

of burial, and who by virtue of their close relationship with the deceased might be regarded as under a duty to give the corpse decent interment. I confess that I am unable to see how we can ignore such definite decisions and pronouncements as to the law.

It must be remembered that the imperious necessity for speedy burial (or other disposition) of the dead, which is at the root of the doctrine that there can be no property in a corpse, is recognized and enforced by the common law of England, irrespective of the particular facts or expediency of each case. The ecclesiastical Courts, it is true, had cognizance of the *mode* of burial (the kind of coffin, if any, the rites, the precise place of sepulture, &c.): see *Gilbert* v. *Buzzard* (1). But the right of burial was a common law right, not a mere ecclesiastical right. The common law Courts would grant a mandamus to bury. There is a duty to bury; "the right of sepulture is a common law right": *R.* v. *Coleridge* (2). It cannot, therefore, be reasonably contended that, because there is no established Church in Australia, and no ecclesiastical Court, the doctrine as to property in a corpse does not apply here. Moreover, though certain ecclesiastical laws did not apply to New South Wales, the Supreme Court of New South Wales had ecclesiastical jurisdiction granted to it (4 Geo. IV. c. 96, sec. 10; Charter of Justice, 13th October 1823; 9 Geo. IV. c. 83, sec. 12).

But it is urged that there must be property in a mummy. The point has not been tested, I believe, in British Courts; but I assume that there can be property. Yet, leaving out of consideration the facts that the corpse in the case of a mummy has been turned into something very different by the skill of the embalmer, and that the clothing of the dead is of itself property in English law, it has to be remembered that the dead body has been buried in foreign soil, in a country where British law does not prevail, where the common law doctrine as to burial and Christian burial does not apply. After burial, the civil remedy in England for taking a corpse is an action for trespass to the land; but the action for trespass does not lie as to Egyptian land. It is not easy to see how British Law Courts could take cognizance of the removal of the dead from foreign soil. Moreover,

(1) 2 Hag. Con., 333.

(2) 2 B. & A., 806.

there is no one interested in insisting that the mummy shall not be disturbed.

It is also urged that there must be property in skeletons and other such exhibits in museums and anatomical schools. It ought to be sufficient to say that this question is not the question before us. No doubt, these things are bought and sold—money is paid for them as for property. But we have not been referred to any instance in which any British Court has recognized a human skeleton as property. Such traffic as there is in skulls and bones is clandestine. If they come from dissecting rooms, they come in violation of the law; for, according to the New South Wales *Anatomy Act* 1901, following the British Act, no dead body can be used for dissection except under very stringent conditions, in anatomical schools, &c., and by authorized teachers; and when the dissection is over the body has to be "decently interred in consecrated ground, or in some public burial ground in use for persons of that religious persuasion to which the person whose body was so removed belonged" (sec. 15). Many of the pathological and other specimens exhibited in medical museums—growths, limbs, &c.—have been taken away after an operation by the surgeon with the consent, express or implied, of the living patient, who is only too glad to be rid of his trouble. But I rather think that sundry contraventions of the strict law as to dead bodies are winked at in the interests of medical science, and also for the practical reasons that no one can identify the bones or parts, and that no one is interested in putting the law in motion. Probably some amendment of the *Anatomy Act* may be required to meet modern conditions. But, subject to such regulations as Parliament may frame in the interests of science, all considerations—whether of the public health or of decency or of religion—seem to point to the importance of maintaining the long-standing British law, to the effect that the only lawful possessor of a dead body is the earth (unless there be cremation, which has been held to be lawful by *Sir J. F. Stephen*; *R.* v. *Price* (1).)

If the plaintiff is entitled to recover possession of this corpse, there is nothing to hinder any one from snatching the corpse of

(1) 12 Q.B.D., 247.

H. C. OF A. 1908.

DOODEWARD v. SPENCE.

Higgins J.

some eminent man, such as Napoleon, and keeping it in a bottle, or using it for degrading purposes. As Hamlet says, "Why may not imagination trace the noble dust of Alexander till he find it stopping a bung-hole?" But even more—according to the plaintiff—if some one else take away the corpse, the first snatcher must be assisted by British law to recover it. The Court is to be used as a catspaw by a body snatcher. The law is invoked, not only to recognize the right to snatch a corpse, under the "good old rule," but is asked to enforce the return of the body to the snatcher when he has not been able to keep it. The medical man in this case got possession of the corpse, and there is no evidence that the parents consented. But even the parents could not give him any right to the corpse. It was not theirs to give. I do not say that mere possession of the corpse is a misdemeanour on the part of the plaintiff, or unlawful in the sense of being an offence. I do say that the plaintiff—at any rate as he does not want it for burial or cremation—has not established any right to enforce possession. If the plaintiff is right, he could recover possession even from a person who takes the corpse from him with a view to burial. The plaintiff does not want the body either for burial or for cremation. He is under no duty to bury it (or to burn it). He has been exhibiting it for gain, and may possibly want it for gain in the future—if he can evade the police. We are not told why the plaintiff wants the corpse. If we say that he is entitled to get possession, he will be entitled to keep possession; for who is there that has title to take it from him? A right to keep possession of a human corpse seems to me to be just the thing which the British law, and, therefore, the New South Wales law, declines to recognize. But, if the body is to remain unburied, I do not see why the University Museum is not as much entitled to it as the plaintiff. *Potior est conditio defendentis.* For these reasons I am of opinion that the Judges of the Supreme Court of New South Wales were right, and that this appeal should be dismissed.

Appeal allowed. Order appealed from discharged.

Solicitor, for the appellant, *J. B. Frawley.*

Solicitor, for the respondent, *The Crown Solicitor for New South Wales.*

C. A. W.